

BAR NEWS ITEM

Linda L. Beard, Prothonotary of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District, Pennsylvania, has made the following Announcement, concerning Uniform Commercial Code filing fees:

December 4, 1996

Presented are regulations setting forth the amounts of fees and costs to be charged pursuant to Act 167 of 1992, along with the amounts payable to the Commonwealth, during the calendar year 1997. In addition to adjusting the fees (see future issues of the Pennsylvania Bulletin), the amounts have been rounded to the next fifty cents (\$0.50) for purposes of accounting and operational efficiency. (See Supreme Court Administrative Order No. 1, authorizing Court Administrator of Pennsylvania to promulgate regulations to implement costs and fees schedules of Act 167 of 1992.)

"UNIFORM COMMERCIAL CODE (UCC) SCHEDULE

County Fees:

"UCC-1 (per debtor name): \$53.50; each ancillary transaction: \$53.50; for each transaction not filed on a standard form approved by the Department of State, revised 1989 or thereafter: \$125.00; each page of photocopy furnished: \$2.00.

** Seventy-five percent of the above county fees will be paid to the Commonwealth pursuant to the Act for compensation of the justices and judges; therefore, it is necessary to require that the correct fee accompany each filing in order to avoid it being returned.

"Please remember that as of January 1, 1996, all checks should be made payable to Linda L. Beard, Prothonotary."

APPEAL OF BENJAMIN A. STEVENS AND JUDITH E. STEVENS, HIS WIFE, INTERESTED PARTIES, FROM THE DECISION OF THE WASHINGTON TOWNSHIP ZONING HEARING BOARD, Franklin County Branch, Misc. Vol. BB, Page 157

APPEAL OF BENJAMIN A. STEVENS AND JUDITH E. STEVENS, HIS WIFE, INTERESTED PARTIES, FROM THE DECISION OF THE WASHINGTON TOWNSHIP ZONING HEARING BOARD. Miscellaneous Volume BB, Page 157.

Municipalities Planning Code, 53 P.S. 11001 *et seq.*; appeal from grant of conditional use application by the governing body of the municipality; public hearing; necessity of keeping a stenographic record of proceedings before the governing body.

1. Where the caption of a notice of appeal names an incorrect party as appellee, resulting in a failure of service on the correct party, and the appellants promptly file an amended notice appeal and seek leave of court to serve the correct party *nunc pro tunc*, a motion to quash the appeal will be denied where the error is merely a technical one, appellants acted in good faith and the appellee has not shown prejudice.

2. Once the township planning commission holds a public hearing pursuant to public notice on a conditional use application under section 10209.1(b)(10) of the Municipalities Planning Code, the governing body of the municipality, in this case, the Washington Township Board of Supervisors, is not required under sections 10913.2 and 10603(c)(2) to conduct its own public hearing; its role is limited to holding a hearing and considering the planning commission's recommendation as to whether or not the application should be approved.

3. The governing body is required to maintain a stenographic record of hearings it conducts on conditional use applications under section 10908(7) of the Municipalities Planning Code.

4. Appellants are not entitled to an award of attorney fees and costs incurred during litigation of the appellee's motions to quash where the Court specifically retained jurisdiction over those procedural issues, as well as the substantive issues of the case. Appellees likewise may not recover attorney fees and costs because the substantive appeal issues were legitimate and were not litigated in violation of 42 Pa.C.S.A. 2503 governing the award of such fees and costs.

Stephen D. Kulla, Esquire, Counsel for Benjamin A. & Judith E. Stevens

Richard J. Walsh, Esquire, Counsel for Washington Township Board of Supervisors

OPINION AND ORDER OF COURT

HERMAN, J., August 27, 1996:

On October 17, 1994, the Washington Township Board of Supervisors ("the Township") approved a conditional use application submitted by the Washington Township Municipal Authority ("WTMA") for the expansion of its waste water

treatment plant. The approval was based on the recommendation of the Washington Township Planning Commission ("Planning Commission"). Appellants filed a notice of appeal from the Township's decision on October 27, 1994. The appeal is based on the contention that the Township erred in not providing public notice and not holding a public hearing as required by the Municipalities Planning Cod ("MPC"), and that the Township's failure to keep a stenographic record of the hearing denied the appellants the opportunity to appeal their decision based on testimony and evidence presented.¹

On February 21, 1995, the WTMA, which intervened in the case, filed a motion to dismiss the appeal as moot. This motion was based on the fact that on February 9, 1995 the WTMA had filed a second application for a conditional use permit and the Township agreed to hold a public hearing pursuant to public notice on the application. On March 9, 1995, we entered an Order dismissing the appeal as moot but retaining jurisdiction for the purpose of resolving both the substantive merits of the appeal and four procedural motions filed by the parties. We retained jurisdiction because the issues raised are of importance to the public and are capable of repetition and of escaping future judicial review. All parties agreed to the retention of jurisdiction.² The Order directed the WTMA to file of record with the Prothonotary notification that the Township's approval decision of October 17, 1994 had been rescinded. This rescission took place on March 20, 1995 and the WTMA filed a praecipe on March 27, 1995 giving the appropriate notification.

¹ Appellants also raised the contention that the planning agency, i.e., the Planning Commission, provided a recommendation to the Township; however, the appellants have not pursued this issue in their appeal.

² Unless an actual case or controversy exists at all stages of the judicial process, a case will be dismissed as moot. *County Council of Erie v. County Executive*, 143 Pa. Commw. 571, 600 A.2d (1991). There are three exceptions to the mootness doctrine; 1) the case involves questions of great public importance, or 2) the conduct complained of is capable of repetition yet avoiding judicial review, or 3) a party to the controversy will suffer some detriment without the court's decision. *In re Estate of Dorone*, 349 Pa. Super 59, 502 A.2d 1271 (1985).

The Township filed a motion to quash the appeal as defective because appellants named the Washington Township Zoning Hearing Board ("Zoning Hearing Board") rather than the Township as the body whose decision was being appealed. As a consequence of this error, the Township was not served with notice of appeal and writ of certiorari as required by the MPC. Appellants then filed an amended notice of appeal with a corrected caption and the Township filed a second motion to quash the amended appeal. Appellants filed a motion for leave to serve the appeal upon the WTMA as landowner *nunc pro tunc*, which motion the Township opposed. Appellants also filed a motion for leave to substitute the amended notice of appeal with its corrected caption. The WTMA filed a petition to intervene as to both the merits of the appeal and the motion to serve them *nunc pro tunc*. Argument was held on these motions on January 5, 1995. Several hearings as well as discovery were also conducted on these issues. The Court received briefs from counsel by March 1, 1996.

Appellants argue the caption error was simply a technical mistake which they tried to correct in a timely manner and which caused no prejudice to the Township. Having examined the cases cited by both parties, we find where a plaintiff has made a good faith effort to provide notice to a defendant and is not engaged in a course of conduct aimed at "forestalling the legal machinery put in motion by his/her filing, " his case will not be dismissed, particularly where the defendant has not been prejudiced. *Leidich v. Franklin*, 394 Pa. Super. 302, 311, 575 A.2d 914, 918 (1990). Appellants certainly were careless in designing the caption to their notice of appeal and unnecessarily complicated this litigation. They acted promptly, however, and in good faith to correct the error the Township has not shown prejudice. Where an appellant fails to serve the landowner with notice of appeal, section 11008(3) of the MPC allows for service *nunc pro tunc* where the landowner has not been prejudiced. *Taylor v. Zoning Hearing Board of the Borough of Lincoln*, 46 Pa. Commw. 664, 407 A.2d 910 (1979). To grant the Township's motions to quash would defeat the purpose for which we retained jurisdiction, namely, to address the claim that Township must hold a public hearing pursuant to public notice on a conditional use application and to

maintain a stenographic record of same. We turn now to this issue.

Appellants assert the Township erred in granting WTMA's conditional use application without holding a public hearing pursuant to public notice.³ It is the Township's position that the MPC does not require them to hold a public hearing before approving the application.⁴ This dispute centers on section 10603(c)(2) of the MPC, which states:

Zoning ordinances may contain: provisions for conditional uses to be allowed or denied by the governing body pursuant to public notice and hearing and recommendations by the planning agency and pursuant to express standards and criteria set forth in the zoning ordinances...

(Emphasis supplied. Section 10913.2 states:

Where the governing body, in the zoning ordinances, has stated conditional uses to be granted or denied by the governing body pursuant to express standards and criteria, the governing body shall hold hearings on and decide requests for such conditional uses in accordance with such standards and criteria...

(Emphasis supplied).

Appellants contend these sections require the governing body to hold a public hearing pursuant to public notice at which it receives input from the public and reviews the planning agency's

³ A conditional use is "a use permitted in a particular zoning district pursuant to the provisions in Article VI." Section 10107(a). Section 10603 falls under Article VI entitled "Zoning". Except under specified situations, the governing body has exclusive jurisdiction "to hear and render final adjudications" on conditional use applications. Section 10909.1(b)(3). That section is found under Article IX entitled "Zoning Hearing Board and Other Administrative Proceedings" (emphasis supplied).

⁴ The MPC requires the planning agency to hold public hearings and meetings (section 10209.1(b)(10) and to present testimony "before any board" section 10209.1(b)(10.1). The Washington Township Planning Commission held a public hearing pursuant to public notice on September 12 and 26, 1994.

recommendation in deciding whether to approve the application. The Township argues its role is limited to reviewing the planning commission's recommendation at a "hearing" but not a "public hearing" and that once the planning commission holds a public hearing, the governing body is not required to conduct its own public hearing. The Township also maintains it is not required to keep a stenographic record of hearings on conditional uses.

Section 10107(a) defines a "public hearing" as "a formal meeting held pursuant to public notice by the governing body or planning agency, intended to inform and obtain public comment, prior to taking action in accordance with this act." A "hearing" is defined as "an administrative proceeding conducted by a board pursuant to section [10]909.1." This latter definition falls under section 10701(b), the preface of which states: "The following words and phrases when used in Articles IX and X-A shall have the meanings given to them in this subsection unless the context clearly indicates otherwise[.]"

Article IX applies to hearings before the zoning hearing board and "other administrative proceedings," including hearings conducted by the governing body. Clearly the legislature intends a distinction between "public hearings" and "hearings". further, Article IX makes it clear the governing body is to hold hearings as defined in section 10107(b) not a public hearing as defined in section 10107(a). We agree with the appellant that it would be hard to mistake the literal language of section 10913.2 which mandates the governing body hold a hearing. The hearing must, at a minimum, comply with the definition under section 10107(b). We cannot agree with appellants' claim that the governing body was also required to hold its own public hearing on the application. Appellants cite the *1993 Edition of Analysis of Revisions to the Pennsylvania Municipalities Planning Code: Historical Development, Legislative Intent, and Commentary on Amendments Enacted During the 1987-88, 1989-90 and 1991-1992 Legislative Sessions*. This document was prepared by the Local Government Commission,⁵ and offers brief commentary on amendments to the MPC. In relation to section 10603(c)(2), it

⁵ General Assembly of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, March 1993, Second Edition.

states: "This clause was amended to require the governing body to conduct a hearing, pursuant to public notice, on the application for a conditional use ..."As to section 10913.2 it is noted: "This section references the governing body's functions are treated with reference to special exceptions..."

The Township urges us not to rely on these comments in light of the disclaimer on page 12: "The Local Government Commission is prohibited from rendering legal advice or consultation and, for this reason, this document should in no way be considered a legal opinion of the Local Government commission, its staff, or the General Assembly as a whole." In addition to this disclaimer, we find the publication's discussion of the relevant sections of the MPC too cursory to support appellant's claim that the governing body is required to hold its own public hearing on conditional use applications. Moreover, the requirement of section 10603(c)(2) for a hearing pursuant to public notice is satisfied by a public hearing before the Township Planning Commission. This holding is substantiated by section 10209.1(b)(10) which authorizes the planning agency to hold such hearings at the request of the governing body. Therefore we hold the township complied with the MPC in this respect.

We cannot reach the same conclusion with regard to the requirement of a stenographic record. Section 10908(7) under Article IX requires a stenographic record to be kept of all such proceedings. The Township should have maintained a record of their hearing of WTMA's conditional use application.

Appellants seek the award of costs and attorney fees based on their belief that the Township requested the court to retain jurisdiction of this case solely to pursue their motions to quash in an effort to embarrass the appellants for their carelessness in designing the caption on their notice of appeal. The appellants insist the Township has conducted irrelevant and improper discovery in connection with the motions to quash, justifying the imposition of costs and attorney fees under 42 Pa.C.S.A. section 2503(9). We disagree with this characterization, and specified in our March 9, 1995 Order that we intended to retain jurisdiction over the Township's motions to quash as well as the substantive issues raised by appellants in their appeal from the actions of the

Township Board of Supervisors in granting the conditional use application. It is difficult to see how discovery conducted by the Township pursuant to this Court's Order can be characterized as irrelevant or improper and therefore we decline to impose costs and attorney fees on the Township. By the same token, we will not impose costs and attorney fees on the appellants in connection with this matter, since the substantive issues raised are legitimate. Consequently, there will be no award of costs and attorney fees to either party in this case.

An appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 27th day of August, 1996, the Washington Township Board of Supervisors' motions to quash the appeal and the amended appeal are DENIED. Appellants' motion for leave to serve the appeal *nunc pro tunc* upon Washington Township Municipal Authority as landowner is moot since Washington Township Municipal Authority has discontinued its interest in this matter. Appellants' motion for leave to substitute the amended notice of appeal to correct the caption is GRANTED. Article IX, section 10908(7) of the Municipalities Planning Code [53 P.S. 10908(7)] requires the Township Board of Supervisors to keep a stenographic record of hearings it conducts on conditional use applications. Section 1912 of Washington Township Ordinance No. 105 satisfies the public hearing requirement of section 10603(c)(2) of the municipalities Planning Code [53 P.S. 10503(c)(2)].